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FEDERAL/STATE/TRIBAL COMPACT NEGOTIATION--AN
OPPORTUNITY TO QUANTIFY FEDERAL RESERVED
AND INDIAN WATER RIGHTS IN MONTANA

By

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B.S., Watershed Management
Colorado State University - 1969

Presented in partial fulfillment of the
requirements for the degree of

Master of Science (Environmental Studies)

UNIVERSITY OF MONTANA

1980

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Chairman, Board of Examiners


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"If every speaker who has talked in the last twenty years or so about federal-state relations in water law were laid end to end, it would be a good and merciful thing . . . [w]hatever the hue and stripe of his persuasions . . . everyone, I suspect, has reached a common conclusion. Federal-state relations are not satisfactory."

Charles E. Corker, Professor of Law,
University of Washington
School of Law (July, 1971).

"That a gurgling stream, from whose shady depths occasionally a silver fish flashes and a variety of indistinct furry heads take furtive sips is not an integral part of the forest through which it winds, is a thought which would never occur to a poet, [or] a small boy"

Walter Kiechel, Jr.,
Attorney at Law
(October, 1976)

DISCLAIMER

Though I am employed by the U.S.D.A. Forest Service and am involved with securing and administering federal water rights, this professional paper has been prepared totally outside my official capacity. I believe that my professional experience, combined with my work in Montana water law and politics as a graduate student in Environmental Studies at the University of Montana, have afforded me a knowledge (and appreciation) of both the federal and state perspective. The opinions and conclusions developed in this paper are not necessarily those of the U.S.D.A. Forest Service.

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First, special thanks must be given to Dr. Robert E. Eagle, Department of Political Science, for the considerable time and effort he expended in directing my research for this professional paper. Due primarily to the extra effort of a handful of dedicated faculty members at the University of Montana, including Dr. Eagle, a viable and worthwhile program in Environmental Studies is available to students seeking a role in changing the focus of our society toward the natural environment.

Similarly, I wish to extend my appreciation to Dr. Ron Erickson, Department of Chemistry and Director of the Environmental Studies Program--in his many roles as a member of my graduate committee, advisor, and program administrator. I am very grateful for the comments, suggestions, and other assistance of Drs. Eagle, Erickson, and Donald Potts, School of Forestry (my graduate committee) toward the completion of this project.

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- Albert Stone, Professor of Law, University of Montana
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Hydrologist, Missoula

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- Daniel Kemmis, member of Montana Reserved Water Rights Compact Commission.

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I. INTRODUCTION AND OBJECTIVES

As Professor Corker laments (frontpiece), few topics have been discussed in such quantity, for so long, with such vigor, and with such lack of progress as federal-state relations in water law. This paper was undertaken only because the State of Montana is approaching the problem in a new and potentially precedent-setting manner. The purpose of the paper is to document the potential opportunities and problems associated with the ongoing federal/state/tribal water rights compact negotiations in Montana. Although negotiations between federal and state governments and Indian tribes have been used sparingly in the past for settling site-specific water rights disputes, Montana's statewide negotiation process, in conjunction with general water rights adjudications, is the first of its kind in the nation. The principal questions to be investigated in this paper are:

- 1) Does the negotiation process offer a significant potential to resolve the conflicts and uncertainties related to the need for quantification of federal (and Indian) reserved water rights and Indian aboriginal water rights in Montana?

- 2) Can the process reach its legislatively-defined goal of "concluding compacts for the equitable division and apportionment of waters between the State and its people, the several Indian tribes, and the agencies of the Federal government claiming reserved water rights within the State?"¹

The compact negotiation process is just started, and may take several years to complete. Little can now be concluded with confidence about it. Yet, there are some advantages in documenting the issues and the process itself now, in its early stages. If it is successful, other western states might profit from a discussion of its goals and early problems and successes. Also, many of the participants and observers in the Montana effort do not yet fully understand the issues involved. An objective of this paper is to document, as succinctly as possible, the origins and current status of these issues. The paper will endorse the position, for example, that Indian water rights and those of federal agencies, though interrelated, are sufficiently distinct to be considered separately in compact negotiations.

Another objective of this paper is to examine the principles, or elements, of a successful negotiated settlement. There must be, for example, clear advantages for both sides before an agreement can be reached. There

¹Montana Code Annotated (MCA), Title 85, Chapter 2, 701-704.

must also be a willingness to compromise. Once the elements are identified, the question of whether they are present in the Montana compact negotiation process will be explored. Potential obstacles to a successfully negotiated settlement will be identified and discussed within that context.

The final, and perhaps most important, objective of this paper is to contribute to the success of the Montana compact negotiation process by defining and documenting some potential "middle ground" solutions to the problem of quantifying federal reserved water rights. To limit the scope of that portion of the paper, only non-Indian reserved rights, in particular those of the U.S.D.A., Forest Service, are considered in detail. Recommendations are made that reserved rights for instream water uses be recognized by the State of Montana to the mutual benefit of both parties (and ultimately to the public).

It is the author's hope that this paper may be of use to both parties in the current negotiations, perhaps in more fully understanding the issues involved and the position of the other side. Similarly, it would be gratifying if some of the specific recommendations might ultimately find their way into a future reserved water rights compact between the State of Montana and the Federal government.

II. BACKGROUND INFORMATION

Since the passage of the Water Use Act in 1973,¹ the State of Montana has made significant strides toward a comprehensive, centralized approach to water policy and a statewide system of water rights records.² Rapidly expanding energy development activities and far-reaching plans have underscored the urgent need for Montana to define its current and future water needs. Some of the largest unanswered questions deal with the role of the Federal government and the various Indian tribes in managing the limited water resources of the State.³

The worst fears of state government lie with the ill-defined federal pre-emptive powers that result from the supremacy clause of the U.S. Constitution. It seems clear that, if it so desires, Congress may override state policies that limit transbasin or interstate transport of water. In this regard, Montana must rely on a continuation of the

¹Montana Code Annotated, Title 85, Chapter 2.

²See R. E. Eagle, "The Politics of Water Allocation in Montana," Montana Business Quarterly, (Autumn 1978).

³See David Ladd, "Protecting Montana's Water: Support for a State Water Plan," and R. E. Eagle and R. A. Russell, "Water Rights Issues in Montana."

longstanding reluctance of Congress to meddle in the traditional domain of state government in water rights administration.

The second largest area of concern and uncertainty relates to the extent and impacts of the judicially-defined federal reserved water rights doctrine--applicable to federal lands such as national parks, national forests, and to reservations held in trust for the various Indian tribes. Spawned in a U.S. Supreme Court case on the Fort Belknap Indian Reservation in Montana in 1908 (Winters vs. United States),⁵ the reserved rights doctrine still lacks much specific definition. Federal reserved rights, which have come to be defined as that quantity of water needed to accomplish the purposes of the reservation, are in theory open-ended in time. The water need not be used until required, and the right is not lost through nonuse. That aspect of the reserved right is contrary to the concept of prior appropriation upon which most western states' laws are predicated.

Since the purposes of most federal reservations are not expressly stated in the documentation, it is very difficult for a state to determine the magnitude of the rights. And, worst of all, federal reserved water rights are not dependent upon state laws or procedural requirements

⁵Winters vs. United States, 207 U.S. 564 (1908).

for legitimacy. Because of these features, the federal reserved right creates substantial uncertainty over anyone's right to use water on or near federal reservations:

We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit, and which, therefore, are etheric [sic] in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure⁶

This uncertainty threatens havoc in administering water rights in Montana and jeopardizes the otherwise substantial gains that have been made since 1973.

The degree of uncertainty surrounding Indian water rights, for a variety of reasons, is substantially greater. The landmark Yellowstone water reservation process, completed in December 1978, did not deal with Indian rights at all:

It has been said that the Board (Natural Resources and Conservation) wasted its time in making reservations (for instream and future municipal and agricultural uses) because the Indians' water claims are not yet settled. That may well be true for those parts of the basin affected by the Indian water claims . . . [and] the Board knew this all too well, but the Board was required by State law and the Montana Supreme Court to complete its task by a certain

⁶Walter J. Kiechel and Kenneth J. Burke, "Federal-State Relations in Water Resources Adjudication and Administration; Integration of Reserved Rights with Appropriative Rights," in Proceedings of the Eighteenth Annual Rocky Mountain Mineral Law Institute, 18 (1973):536, quoting Colorado Supreme Court, 458 Pacific 2nd 760 at 765.

time. It did not have the option of waiting for the slow legal⁷wheels to grind out the Indian water decisions.

A 1978 Comptroller General's Report to Congress concluded that the federal reserved rights problem is causing considerable controversy and litigation, leads to economic and social disruption, and inhibits the efficient use of scarce western water resources.⁸

Though it has been underscored in Montana by recent energy development plans, the problem has existed for several decades while little real progress has been made in solving it. Litigation at all levels of the judicial system has clarified some very specific points and resulted in a minor amount of quantification of reserved rights. But many large, key questions remain unanswered and the vast majority of federal rights unquantified. To date, the courts have been the only effective forum available. Yet the Supreme Court has only rarely addressed the subject, and when it has, it has not spoken consistently or plainly.⁹

⁷Dr. Wilson F. Clark (member, Montana Board of Natural Resources and Conservation), "A Free-Flowing Yellowstone: The Reservations Challenge," Montana Outdoors, Vol. 10, No. 2, (March/April 1979), quoted in Eagle and Russell, p. 15.

⁸U.S. Comptroller General, Report to Congress on Reserved Water Rights for Federal and Indian Reservations: A Growing Controversy in Need of Resolution, Report #CED-78-176 (1978), p. C-104. (Referred to hereafter as "Comptroller General's Report.")

⁹For a brief discussion of the development of the

Though there are some who still advocate judicial determination,¹⁰ the historical trend seems to indicate that litigation is not the answer for a quick resolution of the need to quantify federal or Indian reserved rights.

An obvious alternative to litigation would be for Congress to clarify the reservation doctrine and require quantification under certain legislatively determined conditions. Though as many as fifty bills have attempted to do so, none have been successful.¹¹ The latest attempt, entitled the "Reserved Water Rights Coordination Act of 1980," is expected by its sponsors to be introduced into the United States Senate soon.¹² Similar to other state-oriented bills before it, the bill would terminate all unexercised federal non-Indian reserved rights, quantify and correlate

reserved rights doctrine by the U.S. Supreme Court, see U.S., Presidential Water Policy Task Force 5a, Report of Federal Task Force on Non-Indian Reserved Rights (Draft), June 1979, pp. 6-10. (Referred to hereafter as "Task Force 5a Report.") For a more detailed discussion, see U.S., Department of Interior, Solicitor's Opinion #M36914, Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Land Management, and Bureau of Reclamation, 25 June 1979. (Hereafter referred to as "Solicitor's Opinion.")

¹⁰ Alan E. Boles, Jr., and Charles M. Elliott, "United States vs. New Mexico and the Course of Federal Reserved Rights," University of Colorado Law Review 51 (Winter, 1980):215.

¹¹ Comptroller General's Report, p. C-150.

¹² C. Roe, "Reserved Water Rights Coordination Act of 1980," (Draft of a bill proposed for introduction in U.S. Congress), April, 1980.

reserved rights with state authorized rights, strictly limit the exercise of Indian reserved rights, and provide for federal compensation of junior water right holders injured by the exercise of federal rights. An obvious, and unavoidable, failing of all such proposed legislative solutions is that their comprehensive nature necessitates heavily favoring one of the two extreme positions. The complexity and diversity of the issues involved seem to preclude a blanket legislative compromise that would be constructive in every instance. In the past, such comprehensive proposals have failed "because the intense and often antagonistic views of Indians, federal, state, and private interests have precluded the sort of consensus that is a precondition to Congressional action on such matters."¹³ If the Roe bill is introduced, there is little reason to believe that Congress is any more capable now of reaching a timely and acceptable compromise than it has been in the past. Rather, a more case specific legislative adjudication approach would seem more likely to succeed--as it has in the past when other potential solutions have failed. The most notable example of such Congressional apportionment of water supplies is the Boulder Canyon Project Act of December 21, 1928--which provided for division of the waters of the Colorado River between the upper basin states (Colorado, Utah, and Wyoming) and the lower basin states

¹³Boles and Elliott, p. 215.

(California, Arizona, and Nevada) after attempts at interstate compact negotiations had amounted to nothing.

Recently a third approach toward reaching a timely solution to the problem--that of administrative (executive branch) action--has been receiving considerable attention. President Carter's water policy initiatives of June 6, 1978¹⁴ and subsequent directives established a policy for federal agencies to "increase the level and quality of your attention to the identification of federal reserved water rights and to move forward with a program for establishing and quantifying these rights." The policy stresses the use of administrative means to accomplish the task. Where disputes arise, the President directed federal agencies to "negotiate and settle such rights in an orderly and final manner, seeking a balance with conflicting and established water uses Seek formal adjudication only as a last resort."

The President's water policy statement marks a new compromise position, of sorts, in federal water rights assertions. In a news release dated June 23, 1979, Secretary of the Interior, Cecil Andrus, summarized that new position:

To my mind, one of the most important elements of the President's message was his directive to use

¹⁴President Carter's Water Policy Message to Congress (June 6, 1978), reprinted in Environmental Reporter 9:228 (1978).

a 'reasonable standard' in asserting federal reserved rights. That means asserting only those rights which reflect our true water needs, the 'minimum' we must have to manage federal lands as Congress has directed. It means we must not--I repeat, not-- seek the broadest theoretical extension of all possible legal rights.¹⁵

In a letter to western governors, Andrus went on to say that "President Carter's directive to all federal agencies to move promptly, in cooperation with Western States, to quantify federal reserved rights is a marked departure from the silence or stubborn intransigence of prior administrations."¹⁶

On July 12, 1978, President Carter issued thirteen directives covering various aspects of his water policy message to Congress six days earlier. One such directive established a Task Force (#5a) on Federal Non-Indian Reserved Water Rights. A draft of the Task Force Report issued in June, 1979 found several reasons for a lack of progress toward quantifying federal reserved rights--among them the fact that there has been a lack of a comprehensive legal policy within and among the agencies.¹⁷ That problem still exists a year later. In keeping with the President's

¹⁵Cited in Simms, Richard A., "National Water Policy in the Wake of United States vs. New Mexico," Natural Resources Journal 20 (January, 1980):12.

¹⁶U.S. Secretary of Interior, Memorandum to Governors Scott Matheson (Utah) and Ed Herschler (Wyoming) regarding assertion of federal water rights, 4 February 1980.

¹⁷Task Force 5a Report, p. 19.

directives, the Task Force Report recommended a policy that "the United States should try to negotiate agreements with each state to protect the interests of the states in systematically identifying and administering water rights, while protecting the interests of the United States in relying on reserved rights."¹⁸

Another reason cited by the Task Force for lack of progress was the failure of western states, with some relatively recent exceptions, to systematically adjudicate water rights within their borders.¹⁹ There is a tendency not to accept federal reserved and Indian water rights as a fact of life. By so doing, the states fail to provide sensible mechanisms with which to deal with them. All too recently, blanket statements of denial and oversimplification have been the response of state officials. Such statements as "federal and Indian reserved rights do not extend to instream uses" were common.²⁰

In Montana, at least, the mechanisms and intent to adjudicate all water rights, including federal and Indian

¹⁸Ibid., p. 46.

¹⁹Ibid., p. 20.

²⁰Interstate Conference on Water Rights Problems, Special Task Force Report on the Proposed Federal Water Rights Legislation (February 1975), paraphrased in Robert S. Pelcyger, "Indian Water Rights: Some Emerging Frontiers," Proceedings of the Twenty-First Annual Rocky Mountain Mineral Law Institute, 21:754.

rights, are now firmly in place with the passage of Senate Bill 76 by the 1979 Montana legislature. The law recognizes that the success or failure of the effort will depend largely on the State's ability to adjudicate federal and Indian claims concurrently. The legislature also established a Reserved Water Rights Compact Commission empowered to negotiate claims with federal and Indian officials.²¹ The primary purpose of the Commission is to establish these claims, or a framework and timetable for quantifying the claims, so that the planned general adjudications under the new law will proceed more smoothly. While negotiations for a compact are being pursued, there is a statutory suspension of action to adjudicate Indian and federal water rights until July 1, 1982.²²

The Montana Reserved Rights Compact Commission, chartered by the 1979 Montana legislative assembly, consists of nine members--four of which are legislators (see Appendix A). The Commission is chaired by Henry Loble of Helena, an attorney quite experienced in Montana and western water law. Two state employees, Scott Brown and David Ladd, have been added to the staff of the Water Sciences Bureau, Water Resources Division, Department of Natural Resources and Conservation to assist the Commission as program manager

²¹MCA, 85-2-702, 703.

²²MCA, 85-2-217.

and staff attorney (respectively). Contacts have been made by the Commission with all Indian tribes and federal agencies thought to claim water rights in Montana. Active negotiations are underway with the Confederated Salish and Kootenai tribes and the Northern Cheyennes. Several meetings have been held with federal officials, but procedural items and questions of authority have so far precluded active negotiations.²³

²³Henry Loble, personal interview, Helena, Montana, 8 August 1980.

III. NATURE OF ISSUES--FEDERAL AND INDIAN WATER RIGHTS

The Montana Reserved Water Rights Commission is charged with two related, but distinct tasks. The first is negotiation with Indian tribes¹ and the second is negotiation with federal agencies.² Though the reserved rights of each owe their existence to the "Winters Doctrine,"³ many of the issues involved are quite different.

All reserved right claims have certain characteristics that cause them to be troublesome to state water administrators. First, the claims may pre-empt state created rights because there is as yet no requirement that the agencies or tribes disclose the claims until they choose to exercise them. Reserved rights are not lost through non-use. Secondly, the claim may extend to uses potentially broader

¹MCA, 85-2-701, 702.

²MCA, 85-2-703.

³The "Winters Doctrine" is the name given to the judicially-created federal reserved water rights as articulated in Winters vs. United States [207 US 564 (1908)] and expanded through subsequent court decisions.

than those recognized as "beneficial uses" under state law.⁴

The issues raised when reserved rights are asserted are:

- 1) was an intent (by Congressional action or Executive Order) present?
- 2) how much water was available?
- 3) how much of the available water was actually reserved?⁵

In nearly every case, the documentation upon which those asserting reserved water rights rely does not expressly answer any of those three questions. For that reason, the judicially-created legal principle is often referred to as the "implied reservation doctrine." Because of the long history of judicial support of the existence of Congressional or Executive intent, it is appropriate to conclude, as one observer does, that "genuine apprehension about federal reserved water rights arises not because they are 'federal' or 'reserved', but because they are 'implied'."⁶ There are no agreed upon rules, and few consistent judicial

⁴Sally K. Fairfax and Dan A. Tarlock, "No Water for the Woods: A Critical Analysis of United States vs. New Mexico," Idaho Law Review 15 (Summer 1979):521.

⁵C. Steven McMurtry, "Comment-Implied Reservation Claims after Caeppeart vs. United States," Arizona State Law Journal, 1977:655.

⁶Charles E. Corker, "Federal-State Relations in Water Rights Adjudication and Administration," in Proceedings of the Seventeenth Annual Rocky Mountain Mineral Law Institute, 17:588.

interpretations, that can be relied upon to help discover how much water was reserved. Two other questions, now being raised with greater frequency, are:

- 1) when was the water reserved?
- 2) (in the case of Indians) by whom was the water reserved?

These two questions relate to a recent tendency by both federal agencies and Indian tribes to assert rights through different authorities, distinct from the federal reserved rights doctrine. There is some question whether the Montana Reserved Water Rights Commission has the authority to negotiate such claims, though its Chairman believes that it does.⁷

In the case of Indian tribes, increasing emphasis is being placed on what have been termed 'aboriginal water rights'--i.e., unextinguished rights to use water that Indians hold as a result of its prior use by their ancestors from time immemorial on ancestral lands still remaining in Indian ownership.⁸ By asserting these rights, the tribes hope to sever some dependence on the federal government

⁷Henry Loble, personal interview, Helena, Montana, 8 August 1980.

⁸For in-depth treatments of Indian aboriginal rights, see William H. Veeder, "Indian Prior and Paramount Rights to the Use of Water," Proceedings of the Sixteenth Annual Rocky Mountain Mineral Law Institute, 16:631-668 and James L. Merrill, "Aboriginal Water Rights," Natural Resources Journal 20 (January 1980):45-70.

and its reserved water rights while taking advantage of recent favorable federal judicial decisions concerning a similar issue--the rights of Indians to hunt and fish on their ancestral lands. The concept, though generally untested in court, has a potential to be an even bigger threat to state control of water than Indian reserved rights. In Montana, Northern Cheyenne Tribal Resolution No. 179 (74), dated March 25, 1974, asserts such rights as follows:

[The tribe] does hereby claim . . . that the Northern Cheyenne Tribe is entitled and now has and at all times had, the first, paramount and aboriginal right to the use of all waters [flowing upon or beneath the Reservation] . . . and hereby declares and claims the aboriginal right to the appropriation, use, and storage of all said waters

Though dismissed by some as an "all conquering battle-cry of those who would recapture the birthright of the American Indian,"¹⁰ aboriginal water rights do appear to have a rational and ethical basis in fact, irrespective of the legal determinations that will be forthcoming. They will undoubtedly be asserted by the tribes through the Montana negotiation process, to some as yet undeterminable extent.

⁹Cited in Merrill (supra), p. 48.

¹⁰Paul L. Bloom, "Indian 'Paramount' Rights to Water Use," Proceedings of the Sixteenth Annual Rocky Mountain Mineral Law Institute (July 9-11, 1970), 16:669.

For its part, the Federal government has recently developed its own "non-reserved" rights theory--also untested by the courts. The Solicitor of the Department of Interior found, in a legal opinion dated June 25, 1979, that the Federal government may establish non-reserved rights to water for "Congressionally authorized management of unreserved lands or reserved lands for objectives apart from the original reservation purpose(s)." Moreover, such rights could be legally established whether or not the state recognized its purpose as legitimate under its laws. In response to the furor created by western water users and state officials, fearful of a new series of court battles and uncertainties, Secretary of Interior Cecil Andrus directed his agencies that there be "no blanket, across-the-board claims for non-reserved rights formally asserted," without his approval.¹¹ However, in the same memorandum, he left open the possibility that it might be necessary to assert such rights to protect federal water needs in situations where statutory or court deadlines exist for comprehensive filing of all water rights. That is the situation in Montana, where all rights, including federal and Indian rights, must be filed by January 1, 1982.¹²

¹¹U.S., Secretary of Interior, Memorandum to Interior Department agencies regarding assertion of federal water rights, 4 February 1980.

¹²MCA, 85-2-212.

Secretary of Agriculture Bob Bergland has committed his Department (which includes the Forest Service) to a similar policy.¹³

In addition to the different authorities under which federal and Indian "non-reserved" rights may be asserted, there are several other major reasons why Indian and non-Indian federal rights should be considered as separate and distinct issues. The first of these is the fact that, unlike most Indian reservations, federal lands tend to be located relatively high in the watershed, and most claims will be for non-consumptive water uses (such as instream flows) which preserve the water for appropriation downstream under state law. The Task Force 5a Report found that to be the major cause of their optimistic finding that accommodation of federal rights to state interests "may not be as intractable in fact as some might perceive them to be in theory." No such optimism can be generated for the Indian situation, where consumptive uses, low in watershed, will predominate.

Federal and Indian water rights are both held by the government in trust for the people of the United States, but in markedly different ways and with significantly distinct implications. Federal rights are held for the

¹³U.S., Secretary of Agriculture, Memorandum to Secretary of Interior regarding assertion of federal water rights, 7 April 1980.

public at large under what is termed the "public trust doctrine."¹⁴ Incumbent upon the government is the responsibility to take into account the public nature and the quality of water in making decisions regarding its use. It is well established under the law that such rights are subject to change and diminution by the government (subject to judicial review) if it is in the public interest. Since members of the public have no property rights in such water, no compensation is due. Of course, the public trust also suggests that the wholesale giveaway of federal rights by the government, to the detriment of the aquatic ecosystem or other environments, is unreasonable and therefore illegal.¹⁵

Indian rights, at least those existing under the federal reservation authority, are held in trust for the tribe and its people under a unique arrangement similar to that of a guardian to his ward. The government may not simply use the public interest test to weigh the benefits of two alternative uses of that water. This relationship has led the National Congress of American Indians (NCAI) and many tribal governments to insist that "Indian water

¹⁴For a discussion of the public trust doctrine, see Felix E. Smith, The Public Trust Doctrine, Instream Flows, and Resources, (U.S. Fish and Wildlife Service--March, 1980) and Joseph Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," Michigan Law Review 68 (1970):473-566.

¹⁵Smith, p. 22.

rights are protected by the 5th Amendment [and] [a]ny compromise, appropriation, or expropriation of Indian water rights . . . will entitle tribes to compensation under the 5th Amendment."¹⁶ The federal government has recognized that Indian rights are private, not public rights.¹⁷

As alluded to above, the U.S. government as a trustee to the tribes is bound to strictly protect the rights and interests of its beneficiaries--the Indian people. Yet the Department of Justice is continually, and increasingly placed into a position of conflict of interest in litigation where it must not only protect Indian rights but also claim federal rights of various agencies that may be totally incompatible with the Indian claims.¹⁸ The Indian people also charge that other violations of the federal trust have been occurring when Congress has appropriated funds for reclamation water projects on rivers in which Indians have Winters claims without providing sufficient capital for development of their rights. The net result, from the Indian perspective, is the development of junior non-Indian

¹⁶Albert W. Trimble (Executive Director, National Congress of American Indians), Letter (7/10/78) to United States General Accounting Office in response to Comptroller General's Report to Congress. For additional information, see "NCAI to GAO: Legislative Quantification of Indian Water Rights is not the Answer," American Indian Journal, Vol. 5, No. 1, (January 1979):33-36.

¹⁷Comptroller General's Report, p. C-113.

¹⁸Veeder, p. 664. See also: U.S. Congress, Joint Economic Committee, Federal Encroachment on Indian Water

water rights with heavy federal subsidization--a discriminatory action that unduly complicates future Indian water developments. The Federal government may also violate its trusteeship responsibilities by failing to provide Indians with the legal and technical assistance necessary to participate effectively in Winters rights quantification proceedings.¹⁹

In addition to the differences in trust responsibilities of the federal government, Indian and other federal reserved water rights also differ substantially as to the purposes for which the reservations were established. Most non-Indian federal reservations require water mostly for non-consumptive uses. Traditionally, Indian water rights have been assumed to stem from the federal government's desire to make farmers of the tribes--i.e., water for agriculture. The amount of irrigable acres has long been used as a yardstick for quantifying Indian reserved rights. Admittedly, agriculture was, in most cases, the purpose for which the Congress or the President originally set aside Indian reservations (although this purpose was seldom expressly stated). Yet, it has been established by

Rights and the Impairment of Reservation Development, 91st Congress, 1st Session (1970).

¹⁹Robert H. Abrams, "Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision," Stanford Law Review 30 (July 1978):11145.

the courts that, in determining the extent of implied federal and Indian reserved rights today, the courts may not be strictly bound to circumstances dating from the actual reservation. They may extrapolate the concept of federal purpose to the present context.²⁰

In other words, the courts need not (though they sometimes still do)²¹ attempt to determine what was on the minds of certain lawmakers back at the time of establishment of the reservations. That, of course, often proves to be a massive, if not futile, undertaking--since it is difficult enough to determine the motives of legislators on contemporary issues. In the words of noted water law expert Frank Trealease:

If this view of reserved rights were accurate there would be some hope for the contentions of some who would limit reserved rights to the bounds established by the ignorance of the reservation founders. Rather, it seems likely that intent [emphasis added] is a presumption that if water is needed to accomplish the purposes of a reservation as now perceived, then enough unappropriated water was reserved to fulfill those purposes. There is no intent to find--the parties simply never thought about the matter.²²

²⁰McMurry, p. 670, (citing Caepaert vs. United States).

²¹A recent example of where the court limited itself strictly to a study of the intent of the legislators at the time of reservation is United States vs. New Mexico.

²²Maxfield, Dietrich, and Trealease, "Indian Water Rights for Mineral Development," in Natural Resources Law on American Indian Lands, Rocky Mountain Mineral Law Foundation (Boulder, Colorado), 1977.

Thus, it is conceivable that modern courts could determine that the purpose of Indian reservations is to provide Indians equal opportunity with other Americans to achieve whatever goals they may set for themselves. That principle, in fact, seems to have already been established by the Indian Self Determination Act of 1976:

The Congress declares that a major national goal of the United States is to permit Indians to achieve the measure of self-determination essential to their social and economic well-being.²³

Whether the courts will so expand the basis of Indian water claims is purely speculation at this time. What does seem clear, however, is that Indians are not limited to using their water for agricultural purposes, even though it may be quantified on that basis. The Supreme Court's recent supplemental decree in Arizona vs. California²⁴ stated that "the means of determining quantity of adjudicated water rights (of Indians) shall not constitute a restriction of the usage of them to irrigation or other agricultural application."²⁵

The discussion above points to the largest and most pressing threat to state water users and administrators in

²³ 25 USC 450-450n, 1976. See Charles DuMars and Helen Ingram, "Congressional Quantification of Indian Reserved Water Rights: A Definitive Solution or a Mirage," Natural Resources Journal 20 (January 1980):31.

²⁴ 439 US 419, 422 (1979).

²⁵ Cited in Merrill, p. 67.

Montana--the potential consumptive use of large quantities of reserved water by Indian tribes for the development of energy resources. In combination with mineral rights, these water rights make an attractive package for an outside developer with capital, or the federal government itself.²⁶ In contrast, other federal reserved rights simply do not have the potential for such disruptive consumptive uses--at issue on federal lands is primarily instream water uses. The Montana Reserved Water Rights Commission, then, has two very different issues before it. Though both are in need of resolution, the non-Indian federal reserved rights issue can be expected to be less complicated and more easily resolved than the Indian issue.

²⁶Maxfield, et al., p. 207.

IV. AN HISTORICAL PERSPECTIVE--PAST USE OF NEGOTIATION TO QUANTIFY RESERVED WATER RIGHTS

On the surface at least, negotiation would seem to be the most suitable method to accommodate the variety of conflicting interests involved in water resource planning. Legislation has accomplished little of a comprehensive nature, and litigation adds exponentially to the cost and time involved in planning. Negotiation can allow resolution of local conflicts between environment and development interests, and between state and federal governments without necessarily establishing precedents. In negotiations, the focus is on the quantity and form of consideration rather than on the fine points of legal argument. The parties merely have to agree to do something, and one party need not even recognize the authorities under which the other claims a right. If a dispute can be settled by negotiation, each party retains some control (as well as saving time and money). If, on the other hand, bargaining fails and the issue goes to court, the result is not always controllable by the participants. The court may render a decision that may make shambles of the planning efforts of the agencies involved.

In spite of the apparent advantages of negotiation for quantifying federal reserved rights, it has not previously been attempted for that purpose on as large a scale as the current effort in Montana. It has been limited primarily to litigated, or potentially litigated cases on a small scale. These negotiations have generally involved either scheduled releases of water below dams or diversions for instream uses, or Indian participation in water resource development projects. For example, in December, 1977, the Gila River Pima-Maricopa Indian Community and the Kennecott Copper Corporation approved an agreement to settle a long-standing dispute over their respective water rights in Arizona's Gila River watershed. The Secretary of Interior, in a news release, stated:

Anyone who has followed western water disputes--particularly in the desert southwest--can only view this agreement as a major achievement. I certainly commend both parties for reaching a sensible, mutually beneficial resolution without costly, time-consuming court suits which might also have seriously disrupted the state's economy.¹

Though the total number of negotiated agreements between Indian tribes and other interests is small, they have taken a variety of forms.² One form is an agreement to deferral of a reserved water right. One such settlement

¹Cited in Comptroller General's Report, p. C-159.

²"Indian Reserved Water Rights: The Winters of Our Discontent," Yale Law Review 88 (July 1979):1693.

was reached between the state of Utah and the people of the Ute-Ouray reservation. The tribe claimed water rights on undeveloped lands susceptible to irrigation. Since the lands are not particularly good irrigable acreage, the tribe signed an agreement (with the consent of the United States) not to develop the lands until the year 2005. That in turn will permit the construction of the Bonneville Unit of the Central Utah Project. The project will make water available for existing and future non-Indian uses, without transferring Indian priorities off the reservation. These uses will, if things go as planned, be displaced by ultimate Indian development. In addition, the Indians did obtain immediate construction of some facilities needed to use some of their water now.³

The Ute agreement illustrates clearly that Indians recognize the vast differences between their theoretical rights and those that they can expect to achieve immediately. They have made large concessions for small gains and many promises. It is, for them, painfully true that the right to water does not necessarily include a right to the capital investment necessary to realize the economic benefits of that right. Their bargaining position has been from a situation of very limited economic alternatives. The agreements achieved, though economically advantageous, may

³Edward W. Clyde, "Special Considerations Involving Indian Rights," Natural Resources Lawyer 8 (1975):250.

be at the cost of weakening the political and cultural integrity of the tribe.⁴

In the case of the Ute agreement, only the future will show the wisdom of the concessions that were made. Another similar case can be cited to illustrate the hazards of negotiating from a weak economic position. It also illustrates a second form of possible compromise--that of shortage sharing agreements, whereby an early priority date is waived when water is insufficient to meet all needs. In 1962, Congress confirmed a Navajo tribal agreement in which federal financing of a massive irrigation project on the eastern portion of the reservation (Navajo Indian Irrigation Project) was promised in exchange for surrender of the Navajo priority to waters needed for the San Juan-Chama project. Unfortunately, the main issue for the Indians was economics rather than the threat to their water rights--so potential Winters rights were not ever a part of their bargaining position. Also, to the detriment of the tribe, the Bureau of Indian Affairs had a strong role in the process--relegating the tribe to ratifiers rather than bargainers.⁵ As a part of the Interior Department, the Bureau of Indian Affairs undoubtedly was hampered in its

⁴Price and Weatherford, "Indian Water Rights in Theory and Practice: Navajo Experience in the Colorado River Basin," Law and Contemporary Problems 40 (Winter, 1976): p. 100.

⁵Ibid., p. 115.

role as a negotiator by the unavoidable conflicts of interest within the Department.

The decade and a half since the negotiations took place have provided a lesson to other tribes that choose to bargain with their water rights. Changes in the Navajo Indian Irrigation Project threaten to undo the agreement.⁶ Federal financial support for the project has been slow and uneven, while the San Juan-Chama project has moved steadily to completion. Time has also shown that the bargain had at its heart a faulty premise--the desirability of fostering small agricultural enterprises in the eastern part of the reservation. The tribe has come to realize that their economic future lies more with industrial than agricultural development. It has been postulated that the lack of funding for the project can be attributed to the reduced power of the Navajo tribe after its primary bargaining advantage (the priority of its Winters rights) had been relinquished.⁷

A third type of possible agreement involves waiving of Winters rights entirely. Public Law 95-328 authorizes the Secretary of Interior to study the feasibility of certain water projects providing that the Ak-Chin tribe agrees to

⁶DuMars and Ingram, p. 22.

⁷Price and Weatherford, p. 130.

waive its Winters rights.⁸ For that consideration, the Indians would receive some of the benefits of the development and other economic incentives.⁹

The options discussed above, and perhaps others, are available to the Indian tribes in Montana. Some tribes are now actively negotiating with the Montana Reserved Rights Compact Commission, while others, such as the Blackfeet, have so far steadfastly refused. In the case of the Indian water rights issue in Montana, the strength of the bargaining position of the parties appears to be largely unknown. If the tribes can avoid the pitfalls of the Navajos, and there is every indication that they will,¹⁰ their bargaining position may be quite strong. They are doing their own negotiation, with the aid of highly skilled consulting attorneys, rather than relying on the federal government. Some of the tribes with reservations on ancestral lands have the option of using claims for aboriginal rights as a point of beginning. All may rely on the recent supplemental decree in Arizona vs. California,

⁸See U.S. Congress, Certain Water Rights Claims of the Ak-Chin Indian Community: Hearings on S 1582 Before Senate Committee on Indian Affairs, 95th Congress, 1st Session, (1977).

⁹"Winters of Our Discontent," p. 1693.

¹⁰Information presented at the Conference on Montana Water Resources in Great Falls, Montana (October, 1980) by tribal officials and representatives leaves the impression that the Montana tribes have learned a great deal from the earlier mistakes of other tribes in approaching negotiations with the State of Montana.

assuring them that their use of water is not limited to agriculture. And some, like the Confederated Salish and Kootenai tribes, have documentation (Hellgate Treaty of 1855) that reveals the importance of the streams and lakes of the reservation to the Indian culture.¹¹

¹¹Veeder, p. 635.

IV. SOME ELEMENTS OF SUCCESSFUL NEGOTIATION

Negotiation has been defined as "a process through which two or more parties try to settle their differences through give and take, resulting in a resolution of some conflict between them." It is characterized by temporary and voluntary dickering over the division or exchange of resources (or perhaps more intangible issues). Generally, it consists of a presentation of demands or proposals by one party, evaluation by the second party, followed by concessions or counter-proposals by the second party. The process is then repeated until a resolution occurs or negotiations break down.¹

Negotiators are, by definition, temporarily adversaries. A negotiator must be able to place some reliance on his opponent's information, though he cannot trust him completely. He must also appear himself to be frank and open in order to gain his opponent's trust, but he must at the same time keep his actual intentions as secret as possible.² Though built upon an adversary relationship,

¹Mary Ray White, "Negotiating Instream Flows-- Course Materials," USDI, Fish and Wildlife Service (1980), p. 6.

²Ibid., p. 7.

negotiations, if they are to be successful, must be built on a foundation of understanding, cooperation, and constructive information exchange.³

As mentioned earlier, one of the purposes of this paper is to explore the potential of the Montana reserved rights negotiation process to succeed at its appointed task. In order to do so, it is necessary to attempt to define some of the elements required (or desirable) for a successful negotiated settlement to occur. From the literature cited previously, (and the author's experience in purchasing homes, automobiles, and assorted animals through negotiation), the following list was developed:

- 1) All interested groups must be recognized and accepted.
- 2) Each party must be able to expect to gain something, through compromise, that they could not expect to readily gain otherwise.
- 3) The negotiators must be qualified and have the authority to compromise. The parties must be able to reasonably expect that the compromise will not be overturned (or overruled) by another party.
- 4) The balance of power between the parties must not be overwhelmingly lopsided.

³Wassenberg, Olive, Demott, and Stolnaker, "Elements in Negotiating Stream Flows Associated with Federal Projects," USDI, Fish and Wildlife Service Report #FWS/OBS-70/03, August 1979.

- 5) Each side must be able to acquire enough information about the other side's needs and preferences to make a good guess of the lowest offer the other side will accept.
- 6) The parties must be aware of the costs of stalemate and time limits for reaching a settlement.

Although there are other necessary elements, those listed above raise questions pertinent to the Montana situation. The eventual outcome of the process will in large part depend on the extent to which these elements are satisfied.

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VI. MONTANA'S NEGOTIATION PROCESS--

ARE THE ELEMENTS PRESENT?

The 1979 Montana legislature established the Montana Reserved Water Rights Compact Commission to interface Indian and federal reserved water rights with the statewide adjudication process, also passed in 1979. The success of each is dependent on the other--if one collapses, the other does too. In the nearly two years that the adjudication process has been in existence, it has often been vigorously criticized by business interests as a waste of time and money. Industrial interests, in particular, have advocated the repeal of the 1979 amendments, or the entire Water Use Act. New, large scale water users such as energy development industries would benefit most by a return to the chaotic water rights system that existed in Montana prior to 1973--it is difficult to deny new water permit requests without any, or with inadequate, information concerning present use levels. Appealing to the natural mistrust of government by the small farmer and rancher, big business has campaigned hard to convince them that the adjudication process somehow jeopardizes their current and future uses of Montana water. The 1981 Montana legislative session will undoubtedly see

an organized effort to scuttle the adjudication process--and perhaps the Reserved Rights Compact Commission along with it.¹

Assuming for the moment that the process survives, its success will depend to a large degree on whether or not the requisite elements of negotiation, as discussed in the previous section, are present. Since the negotiation process is expected to take several years,² and is now only in its very early stages, it is difficult to predict the problems that the Commission will encounter. More uncertain still are the situations that may arise if an agreement is reached and sent to the Montana legislature and United States Congress for ratification. Some predictions can, however, be made with the information that is available now.

Question #1--Are all interested groups recognized and accepted?

At first glance, it would appear that the parties to the negotiations are three--state and federal governments and the Indian tribes. Obviously, each is recognized as having a stake in water resource planning and management in Montana. Government officials, though, are not the real parties to the bargaining--they merely represent most of the actual parties. The struggle for

¹Henry Loble, personal communication, Helena, Montana, 18 August 1980.

²Ibid.

equitable shares of Montana's water is really between business and agricultural interests, Indian tribes, consumers, recreationists, and environmental activists (to name a few). The role of government officials should be to enforce the "law of the land," rather than to become advocates for one side or the other.³

Unfortunately, that distinction blurs easily when the topic of discussion is water rights. State authorities, for example, are responsible not only for enforcing state laws, but also for upholding the Constitution and federal law. It is a mistake, then, to characterize the negotiations in Montana as being strictly between the two levels of government.

As pointed out earlier, the federal government has not often adequately represented the interests of the Indian people in its capacity as trustee. The states have an even more dismal record--there is much evidence of the hostility of state administrative agencies and courts to Indians and their rights.⁴ Indian tribes are best represented in the negotiation process by themselves--as distinct, independent, sovereign (subject to the Constitution), political communities.

³Pelcyger, p. 756.

⁴For a detailed discussion of this evidence, see Pelcyger, pp. 747-751.

The composition of the Montana Reserved Water Rights Commission seems to support a hypothesis that business and agricultural interests will receive strong support on the state end of the bargaining table. Its chairman, Henry Loble, has spent many years representing business interests as an attorney specializing in water law. For those familiar with water politics in Montana, a quick glance at the composition of the rest of the Commission reveals an obvious eastern slope agricultural bent.⁵ Only two of the members, Senator Steve Brown (Helena) and Representative Daniel Kemmis (Missoula), might be said to represent urban and/or western Montana views on water resource management.

Federal agencies, depending on their missions and the purposes of the reservation involved, represent many of the groups not obviously represented by the Compact Commission. For example, the National Park Service, and the Forest Service represent primarily recreational, wildlife and environmental concerns.⁶ The Water and Power Service (formally Bureau of Reclamation) and the Corps of Engineers, on the other hand, are primarily concerned with providing water storage for crops, power and flood control. Most interest groups are represented

⁵See Appendix A for a list of Commission members.

⁶In this context, 'environmental concerns' refers to natural resource management rather than environmental preservation.

to some degree by one or more of the agencies involved.

If the Commission succeeds in its preferred approach --i.e., negotiating with each Indian tribe and federal agency more or less independently⁷--there is reason to believe that most, if not all, interested groups will be recognized, accepted, and represented to some degree in the process. The probable exception might be anyone advocating non-use of the water (leave it where it is because it is there). Even in Montana, with energy development sure to explode, there is not likely to be much unused water leaving the borders in the future.

Question #2--Can the parties expect to gain something, through compromise, that they could not expect to reach otherwise?

The fact that most potential participants in the Montana negotiations have expressed a willingness to enter the process suggests that they perceive a chance to gain. For Montana, elimination of uncertainty is one of the primary goals. Secondary goals probably include savings in time and money in the adjudication process. The Indian tribes are divided on the wisdom of negotiation. The Northern Cheyenne position is that, realistically, they cannot expect to gain all that they believe due them--so the sooner quantification takes

⁷Henry Loble, personal interview, Helena, Montana, 18 August, 1980.

place, the more water is likely to be available to them. They are, therefore, willing to compromise now. The Blackfoot tribe, on the other hand, believes that their legal position is such that they stand to gain nothing, but lose much, by compromise. They have, consequently, refused to negotiate with the Commission.⁸

Earlier, President Carter's water policy initiatives regarding federal reserved water rights were characterized as a compromise position--the federal government is committed not to continue to seek the broadest theoretical extension of its water rights. Negotiation is encouraged. Yet, the policy statement and its accompanying Executive directives did little to guide the agencies toward the solution of some of the major issues. Several large questions were left unanswered:⁹

- 1) how will reserved rights be administered, and by whom?
- 2) what standards should federal agencies use in determining quantities of water associated with their reserved rights?
- 3) how will judicial review be obtained?

⁸The Indian positions were presented by tribal representatives at the Conference on Montana Water Resources, Great Falls, Montana, October 1980.

⁹Hillhouse and Hannay, "Practical Implications of the New National Water Policy," Rocky Mountain Mineral Law Institute 25 (1979): Ch. 22, p. 48.

- 4) will established water uses which are disrupted by the exercise of heretofore unused federal reserved rights be compensated?

The Report of the Federal Task Force of Non-Indian Reserved Rights made some recommendations toward resolving these and other issues. In addition, an interagency working group has recently been established to study and make recommendations relating to the quantification aspects of the Task Force Report.¹⁰ Until there is some clearer and more precise national direction, from the President or Congress, it will be difficult for the federal agencies to define the limits within which they may compromise. A willingness to compromise does not necessarily imply the ability to do so.

From the State side come conflicting signs. The establishment of the Commission was a positive move in the direction of compromise. At the same time, however, State water policy officials have been lending support to the proposed Roe bill ("Reserved Water Rights Coordination Act of 1980")¹¹--a proposal that would, in

¹⁰U.S., Office of Water Data Coordination, "Draft Charter--Interagency Advisory Committee on Water Data," June, 1980.

¹¹Gary Fritz (Administrator, Water Resources Division, Department of Natural Resources and Conservation), personal interview, Helena, Montana, 7 July 1980.

effect, leave the states holding most of the cards if it is ever enacted into law.

Another large question mark concerning the willingness of the State interests to compromise involves the diverse political and philosophical composition of the Montana Reserved Water Rights Compact Commission. So far, the Commission has no formal procedural and operational bylaws established to define its decision making process. Neither does the legislative charter establish any such bylaws. As yet, the Commission's Chairman does not know whether a simple majority or unanimous consent will be required for determining the Commission's bargaining position.¹² That simple administrative detail could make all the difference in determining the effectiveness of the effort. For example, in considering federal instream flow claims, it could be of considerable importance that one of the Commissioners, Senator Jack Galt, led the fight in the 1979 Montana legislature to eliminate the State's own instream flow reservation statute.

Question #3--Do the negotiators have the authority to compromise? Can the parties reasonably expect that the compromise will not be overturned (or overruled) by another party?

¹²Henry Loble, personal interview, Helena, Montana, 18 August 1980.

At this early stage of negotiation, there are many questions and few answers concerning what might follow a future agreement between the Montana Reserved Water Rights Commission and an Indian tribe or agency of the federal government. By law, any agreement must be ratified by the Montana Legislature and the United States Congress.¹³ Due in part to the novelty of the approach, there is little information upon which to base any serious speculation as to what might happen in either forum. Undoubtedly, politicians at both levels will need to be continually informed of progress toward reaching a settlement. The public, too, will need to be informed so that any agreement does not come as an unpleasant surprise to any politically active segment thereof.

Because the Montana process is unique and potentially precedent setting, the federal bureaucracy is proceeding cautiously. To date, it is operating with no clear Congressional or Executive direction to guide its efforts. At the insistence of the MRWRCC, the Secretaries of Defense, Agriculture and Interior have each designated official representatives to the negotiation--a process that consumed several months in the early part of 1980.¹⁴ These representatives have been given no

¹³MCA 85-2-702.

¹⁴Daniel Kemmis (Member, MRWRCC), personal communication, Missoula, Montana, 14 August 1980.

decision-making authority, so their effectiveness as negotiators will be limited by their ability to gain approval of their positions (or definition of their department's position), in a timely and orderly manner. Nor is it even clear whose approval is needed (i.e., does each Secretary have full negotiating authority?).

Assuming that the federal representatives are not hampered by lack of support and/or guidance within their Department, another unknown is the role that the Department of Justice will play in the process. To date, Justice lawyers have assumed a "wait and see" attitude--that is, they are monitoring the process but taking no active role in it.¹⁵ Presumably, they would be involved at least in an advisory role to the President and/or the Congress during the ratification process.

If the Justice Department functions only to define the legal limits of the possible agreements, there may be no cause for concern by those interested in a quick negotiated settlement. There is cause for concern, however, if the Justice Department takes an active role in attempting to define a specific and uniform federal position, and overly concern themselves with the possibility that some legal precedent may be set in the negotiation process. The draft Task Force 5a report

¹⁵Ronald Russell, (U.S. Forest Service), personal communication, Missoula, Montana, 29 September 1980.

points out numerous examples of the relative inflexibility of the Justice Department in situations that might compromise, or diminish, the traditional federal water claims. For example:

- 1) The Justice Department recommended deletion of a Task Force recommendation that "all federal water rights once quantified and adjudicated should, as a practical matter, be subject to administration by the states."¹⁶
- 2) The Justice Department did not support the Task Force recommendation that the United States should participate in state administrative (adjudication) proceedings whenever the interests of the United States can be adequately protected. (Instead, the Justice alternative maintains that the United States can only be a party to a judicial proceeding after being served under the provisions of the McCarren Amendment).¹⁷

It seems likely that more and quicker progress will result if the various federal agencies (or Departments) and Indian tribes are allowed to negotiate separate (and perhaps different) agreements, with minimum active

¹⁶Task Force 5a Report (draft), p. 63.

¹⁷Ibid., pp. 59-60. The McCarren Amendment waives the sovereign immunity of the United States against lawsuits in the case of general judicial adjudication proceedings.

participation by the Department of Justice.

Returning to the state perspective, the MRWRCC clearly has the authority to negotiate a proposal to settle the federal water rights question. It is not clear precisely how such a compact, once ratified by both parties, would interface with the statewide general adjudication process. The enabling statute provides that the contents of any compact shall be included in the preliminary decree (of a general adjudication proceeding) "whether or not it has been ratified by Congress."¹⁸ Section 85-2-234 (MCA) states that "the water judge shall, on the basis of the preliminary decree and on the basis of any hearing that may have been held, enter a final decree affirming or modifying (emphasis added) the preliminary decree. The statutes in combination appear to imply that the terms of a ratified compact might be modified by the District (water) judge in an adjudication proceeding. Though the chances of such an eventuality are considered remote by members of the Commission¹⁹ and their staff,²⁰ it could be considered to jeopardize the realization of

¹⁸MCA 85-2-231

¹⁹Henry Loble, personal communication, Helena, Montana, 18 August 1980. Daniel Kemmis, personal communication, Missoula, Montana, 14 August 1980.

²⁰Scott Brown, personal communication, Missoula, Montana, 30 September 1980.

some of the Federal government's (and Indians') primary purposes for negotiating--to avoid the time, expense, and uncertainties associated with state judicial determination of their water rights.

Question #4--Is the balance of power between the parties overwhelmingly lopsided?

Recent history has strengthened considerably the bargaining position of the State of Montana in dealing with the federal reserved water rights. The McCarren Amendment (43 USC 666) waived the sovereign immunity of the United States in proceedings initiated in State courts for the adjudication of water rights.²¹ It established concurrent jurisdiction in both state and federal courts over federal reserved rights. At first, the parameters and requirements which the state systems needed to meet to adjudicate the United States' reserved rights were not clearly defined. But recent Supreme Court decisions²² have favored the State of Colorado's position that state courts, rather than federal, should quantify federal reserved rights:

Although the Court technically did not abolish federal concurrent jurisdiction over

²¹Task Force 5a Report (Draft), p. 57.

²²United States vs. District Court for Water Div. No. 5 [401 US 527 (1971)]; United States vs. District Court for Eagle County [401 US 520 (1971)]; Colorado River Water Conservation District vs. United States [424 US 800 (1976)].

reserved water rights claims, the opinion reaches this result in effect by dictating federal dismissal in deference to the state forum in virtually every case where a comprehensive state system exists for adjudication of water rights. In practical terms, Colorado River means that most, if not all, future court adjudications of federal reserved water rights will occur in state courts.²³

In Montana, the new statewide adjudication procedure has been patterned after that existing in Colorado to enable Montana to begin adjudications involving Indian and federal reserved water rights. In an effort to test the Montana adjudication process, the U.S. Justice Department filed four suits in U.S. District Court (April, 1979) to adjudicate the rights of the tribes on the Fort Peck, Flathead, Rocky Boy's and Fort Belknap Reservations. On November 26, 1979, U.S. District Judges Battin and Hatfield dismissed all of the suits, preferring to have the rights adjudicated in state court, and citing the Colorado River decision.²⁴

The importance of these developments cannot be over-emphasized. Combined with the President's "reasonable standard" language in his water policy initiatives, they seem to lift the state's bargaining position above the federal. Because of the close relationship between

²³Abrams, p. 1126.

²⁴Robert D. Dellwo, "Recent Developments in the Northwest Regarding Indian Water Rights," Natural Resources Journal 20 (January 1980):113.

water rights and economic development, Montana has strong reasons to construe the scope of federal and Indian reserved rights as narrowly as possible. State courts will have a tendency to do so because of the inherent conflict between reserved rights and the prior appropriation system.

Another significant development, again in the United States Supreme Court, was the decision in United States vs. New Mexico.²⁵ The court limited Forest Service water use under the federal reserved water rights doctrine through a very narrow interpretation of the legislation establishing the National Forest system. The court held that the United States reserved only such water as is necessary for the preservation (and growth) of timber and "securance of favorable water-flows." It also ruled that, although the Multiple Use-Sustained Yield Act of 1960 was intended to broaden the purposes for which national forests are managed, it was not meant to reserve additional water with a priority date of 1897.²⁶ That decision also serves to buttress the state's bargaining position, particularly

²⁵98 S. Ct. 8012 (1978).

²⁶George S. Young, "Reserved Water Rights on National Forests after United States vs. New Mexico," Utah Law Review, 1979:609, 610.

as it relates to instream uses of water on Federal lands.²⁷

Question #5--What are the needs and realities that will define the lowest offer each side will likely accept?

From the state perspective, by far the most pressing need is for quantification and prioritization of federal and Indian water rights. As pointed out earlier, state water planning and administration is threatened with chaos until the responsible agencies can determine how much water is left for appropriation under state law. For that reason, the state is unlikely to agree to any settlement that will leave either existing or future reserved rights unquantified (at least to some realistic level of accuracy) within a certain, relatively short, time period. To do so, they will probably insist that the right to use reserved water in the future, if not quantified and agreed upon in the settlement, be foreclosed--or at least strictly regulated by the state.

Similarly, any future water right needed for the federal government on existing reservations not covered by the agreement will be obtained under state law and

²⁷On Indian lands, on the other hand, a recent ruling by a federal appeals court in Colville Confederated Tribes vs. Walton may have broadened the scope of Indian reserved rights. While the court found that an instream right for fish propagation "will not be implied at this time," it left the door open for such uses under the implied reservation doctrine.

procedures. In establishing priority dates, the state will probably insist that no existing state-authorized water user be injured, unless fairly compensated, by existing or future exercise of federal rights. Thirdly, the state will likely not give up its prerogative to adjudicate all water rights within its boundaries in state courts, including federal and Indian rights under the McCarren Amendment. Once quantified and adjudicated, the state will probably wish to administer all rights within its borders--at least to some extent.²⁸

The federal "bottom line" will likely include the following:

- 1) Preservation of the prerogative of Congress to establish new federal or Indian reserved rights, either on new reservations or by expressly changing the purposes of existing reservations.
- 2) Preservation of the right of the federal judiciary to adjudicate federal or Indian rights where manifest unfairness to federal interests would result if adjudicated in state court.
- 3) Maintenance of sufficient flexibility in quantifying and administering Indian reserved rights to allow

²⁸It is possible that Montana might relinquish some degree of administrative control over some types of federal rights to avoid the costs and manpower needs associated with administering them. For example, the state might be willing to negotiate a set of limits within which Indian tribes or federal agencies could be free to change the type of use, point of use, quantity or other aspect of certain water rights.

federal trust responsibilities toward Indians to be carried out.

- 4) A mechanism for the federal government to obtain sufficient water to carry out its Congressionally-authorized management functions, even if state law does not adequately recognize these functions as legitimate beneficial water uses. For example, on certain federal lands, water is needed to protect recreational, fish, wildlife, and esthetic values and to maintain aquatic or riparian ecosystems--though such uses may not be expressly identified as purposes of the reservation.

The Indian "bottom line" position is a little harder to define specifically--and will likely vary between the tribes. The tribes must ensure that their reservations have sufficient water to allow them to become viable economic and social entities. In addition, cultural and spiritual considerations may well be points considered non-negotiable by some tribes.

It is the author's opinion that the parties will be unwilling to sacrifice the points discussed above to a negotiated settlement. The potential "solution space" or "middle-ground" between these two hypothetical bottom-line positions is extremely large, so there should be no barrier to settlement associated with these positions. Of course, if either party chooses to take a

more rigid stand, the chances for settlement may well decrease accordingly.

Question #6--What are the costs of stalemate and the time limits for reaching a settlement?

The Montana Supreme Court has issued an order under MCA 85-2-212 requiring that all Montana water users file a claim with the Department of Natural Resources and Conservation by January 1, 1982 for all water rights initiated prior to the passage of the Water Use Act of 1973. Presumably, that order applies to federal agencies and Indian tribes as well. Since most exercised federal and Indian rights predate 1973 in priority, the law appears to require that many of the rights to be negotiated through the Compact Commission must also be filed by the 1982 deadline, or face being presumed abandoned in accordance with MCA 85-2-227. That requirement not only places a severe time constraint on the negotiation process (since the basis for establishing existing rights is still being negotiated), but also requires that federal agencies and Indian tribes divide their manpower and dollars to a certain extent to meet both requirements. MCA 85-2-217 suspends general actions to adjudicate federal or Indian reserved rights until July 1, 1982 while the Compact negotiations are still on-going.

In contrast to the state timetable, the (draft) Task Force 5a report estimated that it might take up to five years to quantify current consumptive uses of water, and up to ten years to quantify actual non-consumptive uses and reasonable foreseeable future consumptive uses.²⁹ The report attributes much of the time difference to the lack of well established methodologies for establishing the latter types of uses. In most cases involving non-consumptive uses, the existing methodologies are very site-specific in nature, and depend on the collection of considerable hydrological and biological data. In order for the federal government to meet the existing state imposed filing and negotiation deadlines, new (and less site-specific) procedures will need to be applied. The lack of precision associated with such methodologies will need to be recognized by both sides.

In Montana, the costs of stalemate are difficult to assess. Unlike past situations where negotiation has been successful, there is no particular water project being jeopardized by the threat of an unproductive set of negotiations. The crisis point has not yet been reached. The concept of statewide negotiations could probably be written off as a good, but unworkable, idea

²⁹Task Force 5a Report (draft); pp. 38, 39.

if it failed. But, a return to the situation as it existed prior to establishment of the Compact Commission would mean a continuation of the adversary roles played in the courts for so long (and for so little) by the parties. Tension would undoubtedly increase. The statewide adjudication process would not go nearly as smoothly as it would if agreements could be reached. Expensive and time consuming litigation would likely be the end result. Long delays would increase the possibility that the exercise of federal reserved rights in the future would impair water rights vested under state law.

VII. NON-CONSUMPTIVE WATER USES ON NATIONAL FORESTS

A. Background

On an individual basis, before negotiations can begin in earnest, it will be necessary for the Indian tribe or federal agency involved to establish whether there is anything to be gained by their participation in the process. If the Montana Reserved Water Rights Compact Commission fails completely to recognize as legitimate any of the "bottom line" federal or Indian positions (discussed in the previous section), it would not pay for the federal government or the tribes to dedicate the dollars and manpower necessary to pursue the negotiations. For the U.S.D.A. Forest Service, that determination will be based in large part on the willingness of the Commission to recognize non-consumptive water uses on the national forests as legitimate federal rights. Consumptive water uses¹ comprise such a small percentage of Forest Service uses (much less than 1%) that there would be, for all practical purposes, nothing to negotiate if non-consumptive rights are not

¹Consumptive water uses are those in which water is removed from the water body, used (consumed) for some purpose, and consequently not returned for reuse.

recognized.² That situation is not expected to change much in the future (in contrast to the situation on Indian reservations).

One school of thought (often held by state water administrators) maintains that the concept of non-consumptive (or instream) water rights has no place in the West--where a right is based upon an appropriation, which is, in turn, based upon a diversion for beneficial use:

A[n] instream flow is not an ordinary usufructory interest in property, that is, where water is diverted from nature's design and utilized or made serviceable by man for his design. Quite the contrary, [such claims] are not water rights at all, but simple exercise of governmental dominion over water that prevents its usufructory enjoyment.³

The other point of view recognizes the property interest of the public in general toward maintaining some water within the stream or lake. The public trust responsibilities of the Forest Service require the agency to defend that public interest. To understand the basis for that Forest Service position, it will be necessary to briefly discuss the history of the national forest system in the United States.

The Creative Act of 1891⁴ authorized the President

²Ronald L. Russell (Regional Hydrologist, Forest Service, Missoula, MT), personal communication, 10 October 1980.

³Simms, p. 15.

⁴26 Stat. 1103; 16 USC 471.

to create national forest reserves by withdrawing them from the public domain. As discussed previously, Congress also implied reserved water in sufficient quantities to fulfill the purposes for which the national forests were established. The Organic Administration Act of 1897⁵ detailed the purposes of the national forests:

No national forest shall be established, except to improve and protect the forest within the boundaries or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.

In 1960, Congress supplemented, or clarified, its statement of purposes by passage of the Multiple Use-Sustained Yield Act.⁶ The Act states that "it is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." Based in part upon both pieces of legislation, the Forest Service has historically claimed sufficient water under the implied reservation doctrine so that "minimum stream and lake levels (are) adequate to insure the continued nutrition, growth, conservation, and reproduction of fish and to preserve the recreational, scenic, and esthetic conditions of the riparian

⁵30 Stat. 34; 16 USC 473.

⁶74 Stat. 215; 16 USC 528-531.

corridors."⁷ Collectively, these purposes have come to be called "instream" water uses--or non-consumptive uses that require no physical diversion of water from the stream, lake or aquifer. Until recently, the United States has claimed a priority date for instream water uses as the date each national forest was reserved from the public domain--normally an excellent priority date in most parts of the western U.S. (usually before the turn of the century).

The 1978 U.S. Supreme Court decision in United States vs. New Mexico⁸ has caused the Forest Service to re-examine its reserved water claims for most non-consumptive uses. In a 5 to 4 decision, the Court narrowly construed the purposes of the national forests to include only the protection and production of timber, and "securing favorable conditions of water flows." It concluded that the United States did not have a reserved right for esthetic, recreational, wildlife preservation and stock watering purposes on the Gila National Forest based upon the Organic Administration Act. The court also held that, although the Multiple Use-Sustained Yield Act of 1960 was intended to broaden the purposes for which national forests are managed,

⁷Master Referee's Final Report, Case-in-Chief: Claims of the United States covering water rights with the State of Colorado--Water Divisions 4, 5, and 6. Cited in R. Scott Fifer, "Water Law and National Forest Management," unpublished term paper, Colorado State University (April, 1980), p. 14.

⁸98 S. Ct. 3012 (1978). Commonly referred to as the Rio Mimbres decision.

it was not meant to reserve additional water with a priority of 1897.⁹

This decision is often cited by state officials¹⁰ as clear evidence that the federal government has no non-consumptive water rights unless they are obtained through state processes and under state law. There are, however, a number of reasons why a strict, literal interpretation of the New Mexico decision might not be in the best interests of the state as a "given" in the negotiation process.

B. The Nature of the Conflict

First, such a position would be predicated on the assumption that there is, indeed, a significant conflict or potential conflict between Forest Service instream water uses and state authorized uses. Yet, there is much evidence to indicate that, in Montana at least, such conflict is far more imagined than real. Because of the location of national forest land--i.e., high in the watershed, above most private lands--Forest Service instream rights would, in most cases, help insure delivery of water to downstream users. In the

⁹Young, p. 615.

¹⁰Gary Fritz (Administrator, Water Resources Division, Montana Department of Natural Resources and Conservation), personal interview, 7 July 1980. See Simms for a "state view" of the meaning of the New Mexico decision and the impacts it should have on national water policy.

words of one observer, "59% of the total water (produced in the eleven coterminous western states) flows from national forest and national park reservations [and] [u]ntil the law of gravity is amended or repealed, most of that water is likely to continue to flow."¹¹ On the other hand, there will be a few instances where either existing or future state authorized uses may be precluded or interrupted by federal instream rights. There is an urgent need to identify such conflicts now, at least preliminarily, to speed the adjudication process. The negotiation process offers a unique degree of flexibility in solving such conflicts, by allowing agreements on shortage sharing, flexibility in assigning priority dates, or providing for just compensation to the injured party. A strict interpretation of the New Mexico decision, by precluding negotiation with the Forest Service, would forego the opportunity to identify and solve the few conflicts that will exist, without resorting to expensive and time consuming litigation.

In defining the State's position, it will also be important for Montana officials to keep in mind the significant differences between Montana and New Mexico water rights situations. In New Mexico, there is no recognition of recreation, fish and wildlife as beneficial uses of water--there is too little water to give such uses any legitimacy in many areas of the state. Most, if not all, streams and rivers in

¹¹Corker, p. 584.

New Mexico are already over-appropriated. In Montana, where unappropriated water still exists, the law wisely recognizes the importance of instream water uses to the state and its people. MCA 85-2-316 authorizes the state or any agency of the United States to apply to the Board of Natural Resources and Conservation to reserve waters to "maintain a minimum flow, level, or quality of water throughout the year or at such periods or for such length of time as the board designates." Because of the existence of that law, the state could argue that federal instream flow rights are unnecessary. However, a close examination reveals that quantification of federal reserved rights is needed to strengthen the state instream reservations.

There are at least two major reasons why the state reservation process, as it now exists, cannot adequately substitute for federal instream rights on national forest land:

- 1) The state water reservation process will likely take a minimum of 15-20 years to complete. In the interim, the day-to-day administration of water use applications, and the upcoming general adjudications, recognize no other environmental considerations. Instream users apparently have no legitimate claim to water until a reservation is granted by DNRC under existing state laws. In contrast to most other western states, Montana does not have a "public interest" requirement for issuance of a water use permit. Such requirements, in other states, usually allow the water rights administrator to reject an application for a water

use permit if it unreasonably conflicts with the "public interest." The result of this situation in Montana is that, if a permit request poses no threat of injury to established diversionary water rights (in river basins where instream reservations have not been made), state law allows no discretion--the DNRC must issue the permit.¹²

2) Since the instream flow reservations were granted for the Yellowstone River by the Board of Natural Resources and Conservation (Dec. 1978), the state instream reservation process has been under attack by business and agricultural interests. In the 1979 legislative session, Senator Jack Galt (a member of the MRWRCC) introduced a bill into the state senate to eliminate instream reservations altogether. Though that bill failed, another one passed--which provided among other things, that instream flows are limited to 50% of the average annual stream flow. That limitation would provide insufficient protection to many headwater streams on national forest land. The legislative history serves to illustrate the vulnerability of the state instream flow reservation process to modification or possible elimination by de-authorizing legislation.¹³ Based solely on state legislation, instream rights on national forest land would have no certainty of tenure.

¹²For additional information, see Eagle and Russell, pp. 11, 12.

¹³For more on the 1979 Montana Legislature's treatment of the state instream flow law, see Eagle and Russell, pp. 9-13.

Federal instream rights, if recognized by compact and subsequently incorporated into the state instream reservation process, could eliminate or significantly diminish the two problems discussed above. Once a compact is signed, federal instream rights can immediately be incorporated into the permit granting and adjudication processes without waiting for the state reservation process to reach its conclusion. Such federal rights would not be subject to elimination by state legislative action.¹⁴ If held jointly with state wildlife and water quality agencies under the state reservation process, federal reserved rights would strengthen the state's position in protecting instream values in a large percentage of the state's prime aquatic habitat and recreational waters.

C. Weaknesses of the New Mexico Decision

The several weaknesses of the New Mexico decision itself provide additional arguments against its use to define the limits of the state negotiating position. There is an important distinction to be drawn between the Supreme Court's approach (in New Mexico) and the approach now possible through the negotiation process:

The key to the analysis should not depend on a search of archaic legislative history. Rather, it should depend on an equitable balancing of the present needs and benefits of the federal reservation

¹⁴If state ratification of a compact were revoked, such revocation would, however, render the agreement null and void.

with the state's desire for predictability and the expectations of private appropriators under the law.¹⁵

The first weakness of the New Mexico decision is its failure to consider the purposes of the national forest as now perceived. By limiting itself to the wording of the 1897 Organic Administration Act, the decision ignores a substantial body of subsequent legislation that broadens the original purposes and the management objectives of the Forest Service. The Multiple Use-Sustained Yield Act (1960), the National Forest Management Act (1976) and the Wild and Scenic River Act (1968) are all good examples of explicit pieces of legislation that belie the Court's apparent determination that "most national forests . . . are not forests in the common meaning of the term, but are more in the nature of tree farms."¹⁶ Strictly interpreted, New Mexico clearly limits national forest reserved rights acquired between 1897 and 1960 to the purposes in the 1897 Act. Justice Powell's dissenting opinion in the case points out that, although the Court in the majority opinion "purports to hold that passage of the 1960 (Multiple Use

¹⁵Michael Wrenn, "Water Law--Quantification of Water Rights Claimed under the Implied Reservation Doctrine for National Forests--United States vs. New Mexico, 438 US 696 (1978)," Washington Law Review 54 (Oct. 1979) 875.

¹⁶"Supreme Court Strikes New Balance in Federal-State Tension Over Western Water Rights," Environmental Law Reporter, Vol. 8, No. 9, (Sept. 1978), p. 10182.

Act) did not have the effect of reserving any additional water in existing forests, . . . this portion of its opinion appears to be dicta."¹⁷ As such, the question is open for additional judicial deliberation in future cases, if necessary. A reasonable interpretation of the language of the Multiple Use-Sustained Yield Act would be that Congress desired to keep its 1897 priority for the original purposes outlined in the Organic Administration Act, and at the same time obtain reserved rights for additional purposes (fish, wildlife, recreation, etc.), with a priority of 1960. The active role of Congress in making appropriations for the purposes outlined in the 1960 act, and subsequent legislation, strongly indicate that Congress did indeed intend for the national forests to be managed for purposes other than growing trees and transmitting water downstream. Though, in many areas of the west, a 1960 priority date would be virtually worthless--it would be far better than a future state instream reservation in Montana.

The argument outlined above assumes that the Multiple Use Act supplemented the purposes of Congress in authorizing the establishment of national forests. There is considerable

¹⁷98 S. Ct. 3023, cited in Young, p. 616. The legal term, "dicta" means an observation or remark made by a judge in pronouncing an opinion, but not necessarily involved in the case or essential to its determination. Such opinions lack the force of adjudication, as they are considered not to be the professed, deliberate determinations of the judge.

evidence to indicate that by passage of the Act, Congress merely clarified its policies.¹⁸ There is much to suggest that Congress has always desired that national forests be managed as viable, balanced ecosystems. The language of the Organic Act, in addition to the tree and water production mandates, also clearly charges the Forest Service with improving and protecting the national forests.¹⁹ In the New Mexico case, the Forest Service had argued that such protection constituted a third purpose, within which instream uses would logically fall. The four dissenting justices agreed, saying:

. . . the forests consist of the birds, animals, and fish--the wildlife--that inhabit them, as well as the trees, flowers, shrubs, and grasses. [We] therefore would hold that the United States is entitled to so much as is necessary to sustain the wildlife of the forests, as well as the plants.²⁰

The National Environmental Policy Act of 1969, the National Forest Management Act of 1976 and numerous Executive Orders pertaining to the protection of aquatic and riparian habitats all reinforce this position. In the New Mexico case, then, the Supreme Court appears to have seriously misconstrued the original purposes of the National Forests.

¹⁸Wengert, Dyer, and Deutsch. "The Purposes of the National Forests--A Historical Re-interpretation of Policy Development." A Report to the U.S. Forest Service pursuant to contract by Colorado State University, Fort Collins, Colorado. January 1979.

¹⁹See quotation, p. 60, from Organic Act.

²⁰Cited in Sally Fairfax and Dan Tarlock, p. 533.

If the decision stands as a definitive judgment on the extent of reserved rights, it will be necessary in some cases for water to be obtained for these purposes by other means such as condemnation, purchase, special use permit or easement clauses, or perhaps even through the judicious application of the "non-reserved" federal rights concept articulated by the U.S.D.I. Solicitor.²¹

Another weakness of the New Mexico decision is its failure to recognize other consumptive uses (in addition to timber growth) as legitimate on national forest land. The Forest Service has always believed that it possessed reserved water rights for fostering economic benefits for both the locality and the Nation as a whole. Legislative history supports the use of reserved water for public recreation, grazing, mining and other consumptive uses. Many special use and grazing permittees using national forest land have relied upon Forest Service water rights in lieu of making application for the rights themselves under state law. Fortunately, in Montana (unlike most other western states), the Forest Service may still file on such rights and perhaps have them adjudicated as "use rights" if established prior to 1973. However, those individuals establishing uses after that time, for which they believed a Forest Service right existed, should not be penalized for that assumption.

²¹Solicitor's Opinion # M36914.

VIII. A PROPOSAL--TOWARD DEFINING A "MIDDLE GROUND"

The previous section develops the point that the Forest Service has reasonably strong grounds for entering negotiations with the MRWRCC claiming substantial non-consumptive water rights--in spite of the Supreme Court's decision in the New Mexico case. It also suggests a number of general reasons why it might be to the advantage of the State of Montana to recognize all or some portion of those claims. Now, the task at hand is to explore some specific points of negotiation and recommend solutions that appear, at least potentially, to be mutually beneficial.

A. Process

At the outset, as suggested previously, there are a number of procedural problems that need to be remedied to assure that negotiations proceed smoothly toward a compromise. These may be summarized as follows:

- 1) For greater efficiency, the existing requirement that federal "use rights" (those established before 1973) be filed with the Department of Natural Resources and Conservation outside the

negotiation process should be eliminated. (Or alternately, only non-consumptive uses might be excused from filing. Consumptive uses would then be filed by the statutory deadline, removing them from the negotiation process. Such uses, quite small in quantity in the case of the Forest Service, would then be subject to adjudication by the water judges).

- 2) To minimize the possibility that a ratified compact could be nullified by the state judiciary, the relationship of the compact to the final decree in the statewide adjudication process should be clarified by the Montana legislature prior to or during ratification of any forthcoming compact. The Compact Commission, state political leaders, and state government officials must actively inform and involve the public, the state Congressional Delegation, and special interest groups of the progress and objectives of the Commission.
- 3) Finally, in due course, the Commission should adopt internal operating procedures to ensure that differences in the political and philosophical composition of the Commission itself do not paralyze its ability to compromise.

B. Authority, Beneficial Use, and Priority

One of the primary advantages of negotiation is that the legal authority for a claim need not be firmly established in the law for the claim to be recognized as legitimate. In other words, the settlement need not follow legal precedents already established. Nor do the parties need to fear the establishment of legal precedent through their agreement. The terms agreed to by both parties need only be mutually beneficial. So, the MRWRCC should be receptive to all Forest Service water rights claims initially. Then, the final determination of the legitimacy of the claims should rest on a careful balancing of federal and state objectives.

In general, Montana law appears to have failed to recognize water uses without diversions prior to the passage of the Water Use Act in 1973.¹ There is, however, clear indication that Congress authorized the Forest Service to use water in the stream for a variety of purposes prior to 1973. Forest Service instream uses should, then, be considered as "use rights" under Montana law, since they lawfully commenced prior to the passage of the Water Use Act. As a starting point, such rights should, in general, be considered to have a priority date of 1960--the year of

¹For a discussion of Montana law regarding instream appropriations prior to 1973, see Albert W. Stone, Selected Aspects of Montana Water Law, Mountain Press Publishing Co., (Missoula, MT), p. 30.

passage of the Multiple Use-Sustained Yield Act--unless otherwise established by specific documentation.

C. Quantification of Existing Forest Service Rights

Because of the negligible impact of most instream rights on other users, it is not vital that the exact quantity of every single water right be ascertained.² Nor is it practical to do so within the time limits imposed by existing state laws--for it would require considerable site specific data on each and every national forest stream in Montana. A more reasonable approach is to establish an approximation technique, using a variable (by geographic area) percentage of average annual flow as a maximum claim. Once established, these formulae could be used to calculate the approximate instream rights for each stream, at points either 1) at the national forest boundary or 2) above existing or state authorized diversions (or other uses). Those quantities of water so calculated would then be accepted and adjudicated as Forest Service rights, with the stipulation that, where there are conflicts with existing state authorized users, a more site-specific analysis will be conducted and a better approximation established. These conflicts would logically be surfaced during the preparation of the final decree in the upcoming general adjudications.

²There is no reason, however, why existing Forest Service consumptive water uses cannot be accurately determined.

For the purposes of the state, it would seem reasonable that the new claim be limited to a number less than or equal to the first approximation.

Using this approach, it is incumbent on the Compact Commission to establish 1) a procedure for determining the first approximation of Forest Service instream water rights and 2) a mechanism for site-specific analysis in the event of conflict with existing state authorized water uses. For this procedure to be effective, the Commission must retain the authority to make the final determination (which, as an amendment to the compact, must be agreeable to designated representatives of both parties). Only in the event of a failure to reach a compromise would the judiciary become involved in adjudicating such rights.

The general adjudication process will identify where existing Forest Service rights interfere with existing state authorized uses. The state water reservation process, on the other hand, is designed to balance instream and future consumptive uses. The negotiated agreement could stipulate that, where conflicts surface, site-specific analyses be conducted during the state reservation process to replace the first approximation values of Forest Service instream rights with more specific (and mutually acceptable) values. It must be emphasized that the standards and processes established by the Compact Commission, and not the state water reservation laws as they exist at the time,

would of necessity be the governing mechanism for final quantification of federal instream "reservations." (For example, the current limitation on state instream reservations of 50% of average annual flow of record³ and the authority of the Board of Natural Resources and Conservation to revoke or modify the reservation would not necessarily apply to federal rights unless such were part of a mutually defined set of criteria or standards.)

To summarize, all federal non-consumptive rights would be approximated within a short period of time for inclusion in the preliminary decree of the statewide adjudication process. The quantities so identified in a ratified agreement would be final determinations, except 1) where conflicts with existing state authorized, or use rights, are identified and need to be resolved prior to issuance of a final decree or 2) where applications for water reservations under MCA 85-2-316 make it apparent that conflicts with future needs exist. In both cases, the Forest Service would be required to conduct site-specific analyses for streams in conflict using standards established by the Commission. The new, or final quantification would be less than or equal to the original estimate and subject to agreement by both parties.

The net result of such a process would be to:

³MCA 85-2-316(5).

1) Provide initially a reasonable estimate of existing Forest Service non-consumptive uses (and a precise quantification of the minor existing consumptive uses) for purposes of the preliminary decree within the statewide adjudication. Such information would not only speed the adjudication process, but would also be extremely useful to state water administrators in water resource planning efforts--both inter- and intrastate.

2) Provide a final quantification of existing Forest Service non-consumptive uses at the completion of the first round of state water reservation determinations under MCA 85-2-316. To the extent that state agencies held all, or portions of, the federal instream rights jointly under the state law--the state's ability to implement its policy to "provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems"⁴ would be strengthened.

3) Eliminate costly site-specific determinations of Forest Service non-consumptive water needs where no existing or foreseeable conflicts exist.

D. Quantification of Future Forest Service Rights

On existing reservations, once Forest Service non-consumptive water needs are quantified as discussed in

⁴Water Use Act [MCA 85-2-101 (Policy)].

the previous sub-section, there should be no need for larger quantities of non-consumptively used water. Further exercise of reserved rights for such uses could be terminated by agreement. If additional needs do occur in the future, the United States may exercise its prerogative to purchase or condemn the water that would be needed. On any new reservations, the United States should agree to quantify its water needs at the time of reservation, and limit its claims to unappropriated water.

There are identified future needs for relatively small quantities of water for consumptive uses on existing reservations. The Forest Service maintains an inventory of such needs. The state should consider Forest Service claims for future consumptive uses up to an agreed upon cut-off date--perhaps 15 to 20 years. Claims should include those for all consumptive uses recognized by the State of Montana as "beneficial uses"--they should not be limited to the New Mexico definition of reserved rights. In other words, the Forest Service would submit claims to the Commission for future consumptive water needs until, say, the year 1985 for all of its typical uses (range, recreation, fire protection, silviculture, wildlife, etc.). Once an agreement is reached, an upper limit on Forest Service consumptive use would be established in each river basin and water requirements in excess of that amount (or beyond the cut-off date) would need to be obtained under

state law and through state processes. That would, in effect, constitute a relinquishment of unexercised reserved rights with a grace period during which the Forest Service could program money and develop its highest priority water using projects. From the state perspective, the uncertainty of the future intentions of Forest Service would be eliminated. Federal reserved rights would no longer exist after the cut-off date--the entire federal rights situation would then be integrated into the state system.

E. Reasonable Compensation

In theory, the reservation doctrine means that the federal government need not compensate for an impaired right junior to the reservation right. Professor Frank Trelease (University of Wyoming Law School) concludes:

. . . The only difference resulting from reliance on the reservation doctrine instead of a more basic federal power is that in some cases where the water is taken from persons who have previously put it to use, the United States need not pay for the taking. The reservation doctrine is a financial doctrine and nothing more.⁵

In reality, there are few cases where rights of others have ever been impaired by the exercise of Forest Service reserved rights. The Forest Service Manual (FSM 2541) calls for an analyses of any private rights that might be impaired by

⁵ Frank Trelease, "Federal-State Relations in Water Law," National Water Commission, Legal Study No. 5, pt. V (1971), cited in Richard A. Marquez, "New Mexico's National Forests and the Implied Reservation Doctrine," Natural Resources Journal 16 (October 1976):996.

proposed forest plans, and a consideration for the needs of other water users. But, in the scheme outlined above to quantify all Forest Service rights, there is a likelihood that a few cases of impairment may occur. The Commission should consider a requirement that reasonable compensation be paid to water users injured by the exercise of federal rights, and develop standards for determining the amount of compensation due.

F. Rights of Forest Service Permittees

It is Forest Service policy that the rights to water used by permittees on the national forest be held by the United States in order to maintain management flexibility.⁶ The agency has long discouraged permittees from filing for rights in their own name, though some have done so. The Forest Service may claim "use rights" in Montana for uses initiated prior to passage of the Water Use Act (or alternately, these rights may be negotiated if the Forest Service is relieved from the responsibility of filing). Uses initiated subsequent to 1973, however, present a problem. If the Forest Service or the permittee is forced to file for such rights under state law, the date of priority would be the date of application rather than the date of initiation of use. Since this situation was brought

⁶Forest Service Manual, FSM 2521.

about by the Forest Service's reliance on the existence of reserved rights for those purposes, it is reasonable that such rights be negotiated with the Compact Commission. The agreement should allow retention of the date of first use as the priority date.

G. Administration

Because of the large number of individual uses, and the small total quantity of water needed by the Forest Service for consumptive uses--it would save the state considerable administrative costs and headaches to allow the Forest Service to administer its own consumptive uses on national forest land (excluding land not reserved from the public domain). For example, changes in purpose of use, point of use, season of use, etc., need not be regulated by the State--though periodic notification should be required.

On the other hand, the magnitude of Forest Service instream rights would seem to indicate that the state should retain control of any changes in purpose or point of use. The agreement should not allow use of water to be changed from a non-consumptive to a consumptive use without state approval. On the other hand, it would generally be to the benefit of the state to allow water previously used consumptively by the Forest Service to be used non-consumptively in the future.

IX. CONCLUSIONS

The Montana Reserved Water Rights Compact Commission is a new and potentially effective approach toward some progress (at long last) in federal/state/tribal relations concerning reserved water rights. With the passage of the Water Use Act in 1973, Montana signaled its intention to remove its head from the sand and make a sincere effort to recognize and meet its water rights problems head-on. The 1979 Montana legislature continued in that direction by establishing the Commission and a system for statewide adjudications. The two processes link Indian and federal reserved rights with state authorized rights.

It is fitting that Montana should be the first state to embark on this potentially far-reaching effort, since it was in reference to a Montana case (Winter vs. United States) in 1908 that the concept of federal reserved rights was first articulated by the Supreme Court. Since that time, little real progress has been made through judicial or legislative efforts to integrate the concept into western water law. The time has come to abandon the traditional uncompromising federal and state positions, and seek an equitable compromise. The best, most efficient,

and economical way to accomplish that goal is through negotiated agreements leading to a set of compacts between Montana and the Indian tribes and federal agencies administering land within its borders. President Carter's recent water policy initiatives lend support for that type of approach.

All federal reserved claims are troublesome to state water administrators, but there exists a sharp distinction between Indian and other federal reserved rights. The trust responsibilities of the federal government in the two cases are vastly different. On non-Indian lands, the government must simply uphold the "public interest." Indian rights, on the other hand are private rights--and thus not subject to diminution in the public interest without just compensation.

Past history has shown that Indian tribes must be extremely cautious and knowledgeable before they begin to bargain with their water rights. Their future, as a people, depends on wise decisions concerning their use of water in combination with other resources. The tribes should guard against negotiation from an economic disadvantage, or allowing the government to negotiate for them. Ultimately, the Indian issues may well prove to be the most difficult to resolve through negotiation. It is an open question whether some Indian tribes have anything to gain by negotiating with the Montana Reserved Water Rights Compact Commission.

There is every reason to believe that the Montana Reserved Water Rights Compact Commission can succeed, to a large extent, in its goal of "concluding compacts for the equitable division and appointment of waters between the State and its people, the several Indian tribes, and the agencies of the federal government." A comparison between the elements needed for successful negotiations and the Montana situation leads to the conclusion that most, if not all, are present or potentially present (with possible exceptions in the case of some of the Indian tribes, as noted above). If the public is kept informed and allowed to participate, it seems likely that most interested groups have the chance to be recognized and accepted. The "reasonable standard" language in President Carter's water policy initiatives indicates, for the first time, a clear desire on the part of the federal government to compromise. It is still too early in the negotiation process to determine if there is a genuine willingness to compromise on the part of the Commission--though interviews with some of its members leaves one with considerable optimism. Of course, one of the major uncertainties is the ability of the Commission to convince both the Montana legislature and the Congress to ratify any future agreement that might be reached.

Though the cost of stalemate is a return to the "no progress" situation of the past, successful negotiations could fail to materialize if certain "bottom line" positions

of both sides cannot be agreed upon as starting points. For the Indians, that means that the state must recognize their property rights in water and their desires to turn their reservations into viable economic entities. For the federal land management agencies, such as the Forest Service, that means that non-consumptive water uses, for such things as wildlife, fisheries, recreation, esthetics and ecosystem maintenance must be recognized as legitimate federal rights. Without the legal means to provide water for such uses, the national forests cannot be managed as the public, and the Congress have expressly mandated. Management of such lands requires the accommodation of the need for change resulting from shifts in public needs and expectations--a concept not recognized in the United States vs. New Mexico decision.

Upon examination, there appears to be a viable "middle ground" solution to the conflict between Montana and the federal government concerning non-consumptive instream water rights. In fact, it will likely be to the advantage of the State to recognize most of such claims, to help protect many of the resources that Montanans hold so near and dear to their hearts. Modernized Montana statutes, and a more flexible national water policy have provided the opportunity, for the first time in a long while, for improvement of federal-state relations in water rights. It now remains for the Montana Reserved Water Rights Commission to unlock that opportunity.

APPENDIX A

RESERVED WATER RIGHTS COMPACT COMMISSION

Henry Loble, Chairman
Helena, MT

Representative Audrey Roth
Big Sandy, MT

Senator Jack Galt
Martinsdale, MT

Mr. A. B. Linford
Big Sky, MT

Mr. Everett C. Elliott
Conrad, MT

Representative Daniel Kemmis
Missoula, MT

Mr. William Day
Glendive, MT

Mr. Fred A. Johnson
Great Falls, MT

Senator Steve Brown
Helena, MT

Staff--Department of Natural Resources and Conservation,
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- D. Scott Brown, Program Manager

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APPENDIX B

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APPENDIX C

SELECTED COURT DECISIONS

Winters vs. United States, 28 S. Ct. 207, (1908).

Established concept of implied federal reserved water rights for Indian reservations.

Arizona vs. California, 373 US 546 (1963).

Reaffirmed Winters doctrine, and expanded to non-Indian federal reservations. First actual allocation of water for non-Indian federal reserved lands.

Caepaert vs. United States, 426 U.S. 128 (1976).

Confirms lack of distinction between Indian reserved water rights and other federal reserved rights. Articulated the concept that "the implied-reservation-of-water doctrine reserves only the amount of water necessary to fulfill the purpose of the Reservation, no more."

United States vs. District Court of Eagle County, 401 U.S. 520 (1971).

Court held that the McCarran Amendment allowed a state court to adjudicate federal water rights established under the implied reservation doctrine.

Colorado River Water Conservation District vs. United States, 96 S. Ct. 1236 (1976).

Court held that state District Court has original jurisdiction in adjudicating federal water rights, including Indian water rights.

Colville Confederated Tribes vs. Walton, 460 F. Supp. 1320 (U.S. District Court, Washington), 1978.

Non-Indian successors in ownership of previous Indian Reservation do not succeed to Indian reserved priority date (i.e., reserved water rights on Indian lands are limited to Indians). However, the Winter's right that formerly was associated with the allotment does not escheat back to the tribe when the allotment is sold to a non-Indian.

Supplemental Decree, Arizona vs. California, 99 S. Ct. 995 (1979).

Although the quantity of water necessary for irrigation of land on Indian reservations may be the measure of the quantity of the reserved right, the use of that water is not restricted to irrigation or other agricultural application.

United States vs. New Mexico, 98 S. Ct. 3012 (1978).

Court found that Congress intended national forests to be reserved for only two purposes--"to conserve the water flows and to furnish a continuous supply of timber for the people." Therefore, use of water under the implied reservation doctrine on national forests is limited to those purposes.